

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting
(Chapter VIII, Rule 32(2) (b))
Description of Case

S.A. No. 44 of 2006

Date of decision :- 04-7-2006

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date :- 04.7.2006

Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL
AT NAINITAL

Second Appeal No.44 of 2006

Krishna Pal S/o Multan Singh
R/o village Ruhalki Dayalpur
Pargana Bhagwanput
Tehsil Roorkee, District Haridwar Appellant.
Versus

1. Ram Singh S/o Daleep
R/o village Ruhalki Dayalpur
Pargana Bhagwanpur Tehsil Roorkee
District Haridwar
2. Ramkala S/o Daleep (Now deceased)
 - 2/1 Prakasho Devi W/o Ramkala
 - 2/2 Yashvir S/o Ramkala
 - 2/3 Parveen S/o Ramkala
 - 2/4 Smt. Santosh D/o Ramkala
W/o Balwan Singh
R/o village Amoli P.O. Amoli
Tehsil Devband
District Saharanpur
 - 2/5 Smt. Saroj D/o Ramkala W/o Dharampal
R/o village Amoli P.O. Amoli Tehsil
Devband District Saharanpur
 - 2/6 Smt. Yashoda D/o Ramkala
W/o Sarva Daman
R/o village Sakkan Kala P.O. Sakhan Khurd
District Saharanpur
 - 2/7 Smt. Pushpa Devi w/o Ramkala
W/o vikram Singh r/o Suhagani PO Amoli
Tehsil Devband District Saharanpur
 - 2/8 Smt. Yashwanti D/o Ramkala
W/o Rajbal Singh R/o village Nagali
PO Paharpur Tehsil Devband
District Haharanpur
3. Atar Singh S/o Hemma
4. Yashpal S/o Baru
5. Om Prakash S/o Ram Niwas
6. Satyapal S/o Ram Nivas
No.3 to 6 All R/o village Ruhalki Dayalpur
Pargana Bhagwanpur
Tehsil Roorkee
District Haridwar Respondents

Dated :- 04th July, 2006

Sri Arvind Vashisht learned counsel for the appellant.
Sri Sharad Sharma learned counsel for the respondents.

Hon'ble J. C. S. Rawat, J.

1. The second appeal has been filed under section 100 CPC against the judgment and order dated 30.03.2006 passed by the Addl. District Judge/FTC Roorkee in Civil Appeal No.14/2002 Krishna Pal Vs. Ram Singh & others arising out of judgment and decree dated 14.03.2002 passed by the Civil Judge (S.D.), Roorkee, District Haridwar in original suit No.86/1998 Krishna Pal Vs. Ram Singh & others.

2. Brief facts of the case are that the plaintiff-Krishna Pal filed a suit against the defendants on the ground that the disputed property was a joint property of the plaintiff and the defendants. It was further alleged that the plaintiff and the defendants jointly constructed a 'pakka baithak' in the disputed premises 6 or 7 years ago. The dispute arose in the year 1998 with regards to the disputed building and the defendants wanted to grab the disputed 'baithak' and the defendants tried to keep the exclusive possession over the disputed 'baithak'. The plaintiff was not allowed to use the disputed 'baithak'. As such, the suit was filed before the trial court.

3. The defendants contested the suit and alleged that there was a partition in between the parties in the year 1945 and the disputed land was allocated to the defendants in the said partition. It was further

alleged by the defendants that the ancestral of the parties had some other land which was partitioned in between the parties as has been alleged in para 7 of the written statement.

4. The plaintiff as well as the defendants adduced the evidence before the trial court and the trial court came to the conclusion that there was partition in between the parties in the year 1945 and thereafter the parties are in possession of their respective shares. The trial court further held that the evidence of DW1 Ram Singh and DW2 Gyan Pal to the effect that the partition took place in the year 1945 was found credible and cogent. The trial court held that the plaintiff could not dare to say that the partition did not take place in between the parties in the year 1945. The trial court after considering the entire evidence dismissed the suit.

5. Feeling aggrieved by this, an appeal was preferred before the District Judge and the said appeal was transferred to the Addl. District Judge, who dismissed the appeal after going through the material on record. He held that he was completely in agreement with the findings of the trial court.

6. Feeling aggrieved by the order of the first appellate court, the present second appeal has been filed before this Court.

7. I have heard learned counsel for the parties and perused the record.

8. Learned counsel for the appellant contended that the trial court had based his findings on hearsay evidence which could not be taken into account while holding that the partition took place in between the parties in the year 1945. It was contended that Gyan Pal, who was only 10 years of age at the time of oral partition, had stated that he was present at the time of partition. It was further contended that the evidence of the defendants is contrary with each other and the trial court had wrongly relied upon the said evidence. Learned counsel for the respondent refuted that contention and contended that the evidence of the defendants is credible and cogent. It was further contended that whether the partition had been taken place or not is a question of fact. Both the courts below had given the concurrent findings against the plaintiff. Perusal of the impugned judgment reveals that there is no perversity in the appreciation of the evidence. I am completely in agreement with the findings recorded by the court below. I do not want to restate the effect of the evidence or reiterate the reasons given by the court below. Both the courts below have given the concurrent findings. The expression of general agreeing with reasons given by the courts below, decision of which is under appeal, would ordinarily suffice. **{See Girijanandini Devi Vs. Bijendra Narain**

Choudhary AIR 1967 SC p/1124 and Santosh Hazari Vs. Purushottam Tiwari AIR 2001 SC p965}

9. The High Court in second appeal cannot proceed to re-appreciate the evidence. Even if the findings recorded by both the courts below were wrong, the findings of fact cannot be disturbed without coming to the conclusion that the findings recorded by the courts below were perverse i.e. misreading of evidence or based on no evidence. In the instant case the findings recorded by the trial court are not perverse.

10. The Hon'ble Supreme Court has held in **Santosh Hazari** (supra) that :-

"We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present section 100 substituted in the Code. The first appellate court continues, as before, to be final courts of facts, pure findings of fact remain immune from challenge before the High Court in second appeal. Now, the first appellate court is also a final court of law in that its decision on a question of law even if erroneous may not be vulnerable before the High Court in the second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on questions of

law unless such question of law be a substantial one.”

11. It has also been held in **Rajeshwari Vs. Puran Indoria 2005(7) SCC p/60** that:-

“8. before parting, we feel that we would be justified in pointing out that the amendment brought to section 100 of the Code w.e.f. 1.2.1977 by Act 104 of 1976, has really not advanced the cause of justice. Earlier, interference could be had under section 100 of the Code if the decision was contrary to law or some usage having the force of law; or the decision had failed to determine some material issue of law or usage having the force of law; or suffered from substantial error or defect in the procedure provided by the Code or any other law for the time being in force, which may possibly have produced the error or defect in the decision of the case upon the merits. The provision enabled the court to correct the errors of law or of procedure in an appropriate case and even unreasonable appreciation of evidence could have been brought within the contours of error of law in the circumstances of given case. But by introducing the concept of “substantial question of law” in section 100 CPC, the right of the litigant to have a decision after a reappraisal of the relevant materials by

the High Court has been curtailed. Though courts of first appeal are made the final courts of facts, there are instances when the first appellate courts merely, mechanically confirm the findings of fact rendered by the trial court without an independent reappraisal of the pleadings and the evidence in the case. Since a judgment of affirmance need not be as elaborate as a judgment reversing the decision of the court below, it is often contended that the judgment of the appellate court satisfies the requirements of Order 41 Rule 31 of the Code. There are occasions when the High Court feels the constraint of section 100 and reluctantly declines to interfere though interference would have been proper to render justice between the parties. The High Court are often confronted with an argument that even if what was involved was a mixed question of fact and law or even a question of law, that did not constitute a substantial question of law justifying interference under section 100 of the code. Why cannot an error of law committed by the appellate court be corrected in the second appeal? Why should not a litigant have an opportunity of having the decision in his case corrected for an error of law by the High Court at the second appeal stage?

When a substantial question of law as expounded by this Court is only an open question of law substantial as between the parties, a restoration of the position as it existed prior to 01.02.1977 does not appear to be reopening of the door too wide.”

12. In view of the above, I would like to indicate that all questions of law or fact or a mixed question of law and fact cannot be the substantial question of law. It is well settled position of law that the scope of exercise of the jurisdiction by the High Court in second appeal under section 100 is limited to be substantial questions of law. It was observed in Santosh Hazari case (supra) that a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be a “substantial” question of law it must be debatable, not previously settled by the law of the land or a binding precedent and answer to the same will have a material bearing as to the rights of the parties before the court. As to what would be the question of law “involving in the case” it was observed that to be a question of law “involving in the case” there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by the court of fact and it must be necessary to decide that substantial question of law for the just and proper decision

between the parties. The jurisdiction of the High Court had been curtailed to correct the errors of law or the erroneous findings of fact of courts below even on question of law unless such question of law be a substantial one.

13. In view of the foregoing discussion, I am of view that no substantial question of law arises for consideration in the present appeal. The appeal devoids of merit and is liable to be dismissed. Accordingly, the appeal is dismissed in limine. Costs easy.

14. All the pending miscellaneous application(s) in this case, if any, shall stand disposed of accordingly.

(J.C.S. Rawat, J.)

Dated 04.07.2006
LSR